34-1133

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FRANK HERMAN AND FRANK MULLANEY,
Petitioners,

v.

NATIONAL BROADCASTING COMPANY, INC.,
Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

CROSS-PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where alleged discriminatees under the Age Discrimination in Employment Act were terminated for non-discriminatory reasons (because of the legitimate technological elimination of their jobs) does *Delaware State College v. Ricks,* 449 U.S. 250 (1980) require that the notice of termination be fixed as the date the statute of limitations begins to run where the Petitioners' complaints were not that they were illegally terminated but rather that the discriminatory acts complained of were the repetitive refusal to hire them into other positions for which they applied as the positions became available?

2. Must an alleged discriminatee under the Age Discrimination in Employment Act, in a continuing series of refusals to hire during an ongoing EEOC investigation and conciliation effort, file additional formal notices of intent to sue (charges) for each new refusal even though the agency has advised the employer of the allegations and each new refusal is involved in the conciliation process?

PARTIES

The caption of the case in this Court contains the names of all parties.

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FRANK HERMAN AND FRANK MULLANEY,
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ON CROSS-PETITION FOR A WRIT OF CERTIORARI
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CROSS-PETITION FOR CERTIORARI

Petitioners Frank Herman and Frank Mullaney respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 744 F.2d 604 (CA.7, 1984) (Appendix A). The United States District Court for the Northern District of Illinois issued two opinions in this case. The first opinion, granting Respondent's motion for partial summary judgment on Petitioners' charge of nonwillful age discrimination, is reported at 569 F. Supp. 282 (D.C.N.D. Ill., 1983) (Appendix B). The second opinion, granting Respondent's motion for summary judgment on the remaining claim of willful age discrimination, is not officially reported. It is reprinted in Appendix C.

JURISDICTION

Petitioners received a copy of Respondent's Petition for Certiorari, Case No. 84-984 on December 12, 1984 and this Petition is filed pursuant to Supreme Court Rule 19.5.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District Court was asserted pursuant to 29 U.S.C. § 626(b) and 28 U.S.C. §§ 1331 and 1343(a)(4).

STATUTES INVOLVED

The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.* ("ADEA") and the Portal-to-Portal Pay Act, 29 U.S.C. § 251, *et seq.*, are the statutes involved. The relevant sections of the ADEA are Sections 7(d) and (e), 29 U.S.C. §§ 626(d) and (e), which provide that:

Same: notice to Secretary:[1] timeliness: conciliation, conference, and persuasion

"...

(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed—

[1] Pursuant to a reorganization, effective January 1, 1979, the Equal Employment Opportunity Commission ("EEOC") took over the handling of age discrimination cases from the Department of Labor, 1978 Reorg. Plan No. 1, 43 F.R. 19807, 92 Stat. 3781. The ADEA was then amended to provide for notice now to EEOC instead of the Department of Labor by the filing of a "charge" with the EEOC. As pointed out by the Congressional Conference agreement, "This change in language is not intended to alter the basic purpose of the notice requirement, which is to provide the Department with sufficient information so that it may notify prospective defendants and to provide the Secretary with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation." The conference report also recited that "The conferees agree that the 'charge' requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA . . ." 1978 U.S. Code Cong. & Ad. News, pg. 534.

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Statute of limitations; reliance in future on administrative rulings, etc.

"(e) Sections 255 and 259 of this title shall apply to actions under this chapter."

Section 6(a) of the Portal-to-Portal Pay Act, 29 U.S.C. § 255(a) provides that:

Statute of Limitations

"Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued:"

STATEMENT OF THE CASE

On May 8 and 11, 1978, Petitioners Frank Herman and Frank Mullaney notified the United States Department of Labor[2] that Respondent, National Broadcasting Company, Inc. ("NBC"), was engaging in a policy of continuing age discrimination in the hiring of electronic journalism tape editors and minicam (electronic camera) crew members in the Respondent's news operation at its WMAQ-TV in Chicago. The Department of Labor engaged in an ongoing investigation and conciliation process of the case until at least the end of 1979. During this period Petitioners continued to apprise first the Department of Labor, and later the Equal Employment Opportunity Commission, of hirings which occurred at NBC and the fact that though they had applied for the positions, they were not hired. The district court specifically found that "During the pendency of the EEOC investigation of their charges, Herman and Mullaney complained to EEOC investigators that NBC was continuing to discriminate against them due to their age by... hiring younger persons than they...." (District Ct. Dec., App. 13a). The last such complaint during the period that the EEOC was investigating and attempting to conciliate, related to hirings occurring on August 6, 1979. Late in August, 1979, Petitioner Herman wrote the EEOC, "There are some (other) funny things going on here. There is suppose to be a hiring freeze on, but on 8-6-79 two people were put on staff,...".[3] As the Court of Appeals noted, "... the Equal Employment Opportunity Commission investigated the matter and as of September 21, 1979, believed the charges to have merit. A civil action was never brought by the Commission, however, and on May 2, 1980, plaintiffs filed the complaint in this case" (App. 2a).[4]

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[2] See fn. 1, *supra.*

[3] Final Pretrial Order, Petitioners' trial exhibit 8.

[4] Plaintiffs were not represented by counsel until the time they filed their Complaint.

"The plaintiffs, Frank Herman and Frank Mullaney, were employed as film editors in the news department of NBC's Chicago station, WMAQ-TV. In the mid 1970's videotape replaced film as the means of capturing images. Accordingly, the film department was gradually eliminated as new electronic journalism (E/J) positions were created. Employees who worked with film were not automatically transferred into E/J positions but, rather, had to apply for the jobs as they were created." (Ct. of Appeals Dec., App. 2a).[5] "On March 14, 1978, NBC solicited applications for six engineering positions in the news department. Both Herman and Mullaney applied. Their applications were rejected in writing on March 31, 1979,[6] ostensibly because all news positions had been filled. Herman and Mullaney also were informed that their respective applications would be kept on file pending vacancies." (District Ct. Dec., App. 12a).

"At about the same time as they were rejected for new staff positions, Herman and Mullaney were notified that due to the change to videotape news gathering they would be discharged. Herman's letter of termination was received on April 28, 1978 and announced that his last day of regular employment by NBC would be June 30, 1978. Mullaney's letter of termination was dated March 24, 1978 and indicated that his final employment date would be May 21, 1978. Both letters noted that the impending dismissals were not for any cause attributable to the plaintiffs." (District Ct. Dec., App. 12a). And, as the district court noted, Petitioners "do not argue that NBC's decision to terminate them due to technological changes was improper" (App. 13a). Rather, they "allege that NBC's failure to hire

[5] Employees engaged in Electronic Journalism were covered by a different collective bargaining agreement than those who, as Petitioners here, engaged in film work. Each had a different union with a separate seniority system.

[6] This date is actually 1978. The district court initially, inadvertently, recited the date of March 31, 1979 instead of March 31, 1978 (App. 12a).

them . . . (into E/J openings) violated ADEA" (District Ct. Dec., App. 13a).

The Decisions Below

The district court granted partial summary judgment dismissing the complaint with respect to Petitioners' allegations of nonwillful age discrimination holding that the 2 year statute of limitations relative to the refusal to hire commenced to run on March 31, 1978,[7] the dates they were rejected for hire in the first group of hirings, and "Unless Herman and Mullaney separately filed EEOC charges within 180 days of any violations occurring after March 31, 1978, those claims as well as the discriminatory rejection claims are forfeited" (App. 18). This despite the court's finding that during the pendency of the investigation, as vacancies occurred, Petitioners complained to EEOC investigators about NBC's refusals to hire them into vacant positions filled by others (App. 13a).

The Court of Appeals affirmed the district court with respect to the requirement that Petitioners file anew with the EEOC each time they were refused employment in a vacant position, and additionally held, in reliance upon *Delaware State College v. Ricks,* 449 U.S. 250 (1980), that the two year statute of limitations began to run when Petitioners received their notices of termination from the film department even though there was no contention that such terminations were illegal. It stated, "This case was commenced more than two years after Herman and Mullaney received their dismissal notices and, absent any suggestion that the limitations period should be equitably modified, the district court correctly granted summary judgment in favor of NBC on the plaintiffs' nonwillful claims" (App. 3a).

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[7] The district court later granted summary judgment to NBC with respect to the charge of willful discrimination. This was reversed by the Court of Appeals and the reversal is the subject of NBC's petition for certiorari, currently pending in Case No. 84-984.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Seventh Circuit has totally misinterpreted and misapplied this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980) and has ignored this Court's dictates in *Love v. Pullman Co.*, 404 U.S. 522 (1972). While it acknowledged the Eighth Circuit case of *Dickerson v. DeLuxe Check Printers, Inc.*, 703 F. 2d 276 (C.A. 8, 1983), it nevertheless, without distinguishing the case, reached a conflicting result. It not only affirmed the district court's holding, but even imposed more stringent requirements on an ADEA plaintiff. The district court recognized that "Unlike a discrete violation, such as a discriminatory discharge, it is difficult to date a violation bottomed on a failure to hire or promote due to the employer's ongoing unlawful policy. For example, where there is proof that a plaintiff has made numerous inquiries of the status of a previously rejected application for hire or promotion, and he is again rejected or put off; the most recent rejection in the continuing series is the violation date." (App. 16a). The district court observed that "The last violation, rather than the first in a series, is the triggering event." (App. 16a). Here, despite repeated vacancies, the Petitioners were rejected for hire and these rejections were reported verbally and in writing by Petitioners to the EEOC. The last complaints to the EEOC related to vacancies and hiring which occurred on August 6, 1979 and, the Court of Appeals found that the EEOC continued to investigate the matter until at least September 21, 1979 (and believed that the charges had merit).

It would thus appear that a proper predicate existed for finding that a suit filed by August 6, 1981[8] (two years following the date of the last reported discriminatory act), would have been within the two year statute of limitations. But no. A "continuing violation doctrine is meaningless under the facts of this case" (App. 16a), said the district court, because "The

[8] Suit was filed on May 2, 1980.

effect of finding a 'continuing violation' is to toll the 180 day period for *filing with the EEOC.*" (App. 16a) (Italics his). But here, said the district court, "the plaintiffs timely filed their charges of unlawful rejection with the EEOC. It is only later that they alleged other or an ongoing series of discriminatory acts. Since the 180 day filing period was met, however, no EEOC filing period for the unlawful rejections need be tolled. The continuing violation doctrine is meaningless under the facts of this case." (App. 16a).

How bizarre. No one was seeking to toll anything. The last in a series of rejections for a vacant job filled by others was, as the district court said, the "triggering event." Obviously, Petitioners had two years from that date to file suit and they filed well within that time. The district court required a new "filing" every time a violation occurred, despite the uncontradicted record and findings by both courts that the EEOC was apprised of each new violation, investigated each, notified Respondent of each claim and attempted to conciliate. The district court would not only require a second filing, but a myriad of filings contrary to this Court's pronouncement that even a "second 'filing' by the aggrieved party . . . would serve no purpose other than the creation of a procedural technicality." *Love v. Pullman Co.*, 404 U.S. 522, 526 (1972).[9]

The Court of Appeals agreed with the district court. It held, "Responding to the motion, the plaintiffs asserted that NBC's actions constitute a 'continuing violation'—i.e., illegal discrimination occurs each time NBC hires a person other than the plaintiffs in an E/J position. The district court, holding that the 'continuing violation doctrine is meaningless under the facts of this case,' 569 F. Supp. 282, 286, granted NBC's motion. We

[9] In *Zipes v. TWA*, 455 U.S. 385, 397 (1982), the Court pointed out that in the *Love v. Pullman Co.*, 404 U.S. 522, 526-527 (1972) case, it had "announced a guiding principle for construing the provisions of" there Title VII, noting that "a technical reading would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process.' " See, fn. 4, *supra.*

fully agree with the district court's observation that the plaintiffs' reaction to the motion for partial summary judgment was, in fact, unresponsive. A predicate for a civil suit under the ADEA is a charge (previously an intent-to-sue notice) filed with the appropriate administrative agency. 29 U.S.C. § 626(d)." (App. 3a). **Then,** the Court of Appeals held that "we find allegations regarding the terminations and events prior to the dismissals, but no mention is made of subsequent acts by NBC. In short, no post-termination decision or act of NBC was made the basis of an administrative charge." (App. 3a). Thus, the Court of Appeals not only postulated that each new act had to be "made the basis of an administrative charge" (App. 3a), but it tied Plaintiffs' terminations into the refusals to hire into electronic journalism positions and under *Delaware State College v. Ricks,* 449 U.S. 250 (1980), it set the time for the cause of action accruing as the date that Plaintiffs received their termination notices. The Court stated, "The most recent decision properly before the court, therefore, is NBC's decision to terminate Herman, which was made known to him in April of 1978.... This case was commenced more than two years after Herman and Mullaney received their dismissal notices and, absent any suggestion that the limitations period should be equitably modified, the district court correctly granted summary judgment in favor of NBC on the plaintiffs' nonwillful claims." (App. 3a). In sum then, during an ongoing investigation and continuous efforts of conciliation, we are confronted not only with the requirement of multiple formal filings with the EEOC, but, in those cases, where the discriminatees were already employed with the same employer, being terminated for non-discriminatory reasons (because of the legitimate elimination of their jobs), we are additionally confronted with the fixing of the date the statute of limitations begins to run as the date of the receipt of their unrelated termination notices.

Obviously then, age discriminatees, practitioners and even the EEOC need assistance and direction from this Court. The

ADEA as originally passed required no 'charge,' as such, but merely notice to the Secretary of Labor. And, the statute of limitations for filing suit was not related to the filing of a charge or the giving of notice. Congress merely adopted [29 U.S.C. § 626(e)] the Portal-to-Portal Pay Act's provision (29 U.S.C. § 255) of a two-year statute except for willful violations where the statute is three years. The notice was required to be given not less than 60 days prior to filing suit and within 180 days after the alleged unlawful practice occurred. The Act provided that "Upon receiving a notice of intent to sue, the Secretary (of Labor) shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion." Section 7(d) of the ADEA, 29 U.S.C. § 626(d).[10] The transferring of the administration of the ADEA in 1979 to EEOC and the amendment substituting the word "charge" for "notice" did not "alter the basic purpose of the notice" and the congressional conferees agreed that "the 'charge' requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA. . . ."[11]

Despite the foregoing and contrary to the Eighth Circuit's decision in *Dickerson v. DeLuxe Check Printers, Inc.*, 703 F. 2d 276, 283 (C.A. 8, 1983), which held that "The charge which a plaintiff must file with the Department need not comply with the technical rules of legal pleading" and that even a "telephone call alone had satisfied the 'charge' requirement,"[12] the

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[10]When the EEOC assumed responsibility for administration of the ADEA, the Department of Labor investigator was transferred to the EEOC and continued on this case. If a new "charge" were required, clearly the agency investigator would have so instructed Petitioners. She did not, because there was no reason to do so. She knew the charges, she knew that NBC had notice of the charges and she knew that "conciliation, conference, and persuasion" were ongoing. And the claims (charges) were processed. As distinguished from Title VII, no right to sue letter is provided for by the ADEA.

[11] See, fn. I. *supra.*

[12] *Dickerson v. DeLuxe Check Printers, Inc.*, 703 F. 2d 276, 283

(Footnote continued on next page.)

Seventh Circuit requires a formal charge and a new one even in a continuous course of conduct when the EEOC has the case under investigation and conciliation.

And, finally, it is clear that the Seventh Circuit, despite the express limitations stated by this Court, has extended *Delaware State College v. Ricks,* 449 U.S. 250 (1980) far beyond permissible limits and has improperly applied this Court's announced legal principle. *Ricks* involved the denial of tenure with a resultant termination and this Court held that in such a discrete situation, the statute of limitations commenced to run when the tenure decision was made and Ricks was notified that he was being offered a one year terminal contract. This Court held that "Where, as here, the *only* challenged employment practice occurs before the termination date" (pg. 259) (italics supplied), the statutory period of limitation begins running when notice of termination is given. The Court cautioned in its footnote 9 that "Complaints that employment termination resulted from discrimination can present widely varying circumstances. In this case, the only alleged discriminatory act is the

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(Footnote continued from preceding page.)

(C.A. 8, 1983) adopting the legislative history (*supra,* fn. 1) reviewed the purpose of the notice (or charge) and held that the purpose was only to provide the Department of Labor (later EEOC) with sufficient information so as to notify the prospective defendant and provide the Secretary of Labor (EEOC) with an opportunity to eliminate the alleged unlawful practices through informal methods of conciliation. It would also appear that the Fourth Circuit would disagree with the Seventh Circuit because, in noting that the case before it involved a discrete incident and not continuous conduct, it stated that "A charge filed at any time during (a) continuous course of conduct gives notice of possible intent to sue and provides the Commission with an opportunity to conciliate." *Thomas v. Brown & Root, Inc.,* ____ F.2d ____, 35 FEP 1648, 1650 (C.A. 4, August 29, 1984). In the *Thomas* case, the plaintiff filed relative to a discharge but sued, not on the initial discharge, but on a later discharge only, without filing a new charge and without showing a nexus between the two discharges or contending that the second discharge was part of a continuous course of conduct.

denial of tenure sought by a college professor, with the termination of employment not occurring until a later date. The application of the general principles discussed herein necessarily must be made on a case-by-case basis." (pg. 258).[13] In the present case, the Seventh Circuit saw an intervening unrelated and legal termination, but nevertheless saw termination and termination notices and mechanically applied *Ricks*. Unless the Seventh Circuit's decision is corrected, it will plague age discrimination claimants, employers, practitioners and the EEOC, alike. The pronouncements of the Seventh Circuit are so broad and rigid that they require the attention of and direction from this Court and we so respectfully request.

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[13] In its footnote 16 (pg. 262), the Court said "We recognize, of course, that the limitations period should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes. See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979); *Love v. Pullman Co.*, 404 U.S. 522, 526-527 (1972)."

CONCLUSION

For the foregoing reasons, it is respectfully requested that this petiton for writ of certiorari be granted.

Respectfully submitted,

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APPENDICES

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A. Opinion of the United States Court of Appeals for the Seventh Circuit 1a

B. *Herman v. National Broadcasting Company, Inc.*, 569 F. Supp. 282 (N.D. Ill. 1983) 11a

C. Memorandum Opinion and Order, U.S. District Court for the Northern District of Illinois, September 19, 1983 ..... 20a

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-2834

FRANK HERMAN and FRANK MULLANEY,

Plaintiffs-Appellants,

v.

NATIONAL BROADCASTING COMPANY, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 2207—William T. Hart, *Judge.*

ARGUED MAY 24, 1984—DECIDED SEPTEMBER 26, 1984

Before PELL and ESCHBACH, *Circuit Judges,* and WYATT, *Senior District Judge.**

ESCHBACH, *Circuit Judge.* The issue presented is whether the district court properly granted summary judgment in favor of the National Broadcasting Company ("NBC") and against the plaintiffs alleging nonwillful and willful violations of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634. We agree with the district court that the nonwillful claims are barred by the

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* The Honorable Inzer B. Wyatt, Senior District Judge for the Southern District of New York, sitting by designation.

statute of limitations, but we reverse the award of summary judgment and we remand the case for further proceedings on the willful claims.

I.

The plaintiffs, Frank Herman and Frank Mullaney, were employed as film editors in the news department of NBC's Chicago station, WMAQ-TV. In the mid 1970's videotape replaced film as the means of capturing images. Accordingly, the film department was gradually eliminated as new electronic journalism ("E/J") positions were created. Employees who worked with film were not automatically transferred into E/J positions but, rather, had to apply for the jobs as they were created. The plaintiffs did apply for openings posted by NBC in 1976, 1977, and 1978. Herman and Mullaney, however, were not selected for those positions and, as the film operations were drawing to a close, were dismissed from their employment. Mullaney was 53 years old when he received notice of his termination on March 24, 1978; Herman was 58 when his termination notice arrived on April 28, 1978.

Believing that age played a role in NBC's decisions, the plaintiffs filed age-discrimination charges with the Department of Labor in May of 1978. Pursuant to a transfer of authority, *see* Reorganization Plan No. 1 of 1978, 92 Stat. 3781, the Equal Employment Opportunity Commission investigated the matter and as of September 21, 1979, believed the charges to have merit. A civil action was never brought by the Commission, however, and on May 2, 1980, the plaintiffs filed the complaint in this case.

II.

A suit alleging a nonwillful violation of the ADEA must be brought "within two years after the cause of action has accrued." 29 U.S.C. § 255(a) (incorporated by 29 U.S.C. § 626(e)(1)). Because both plaintiffs received termination notices by April 1978, *see Delaware State College*

v. Ricks, 449 U.S. 250, 258 (1980), but did not bring suit until May 1980, NBC moved for summary judgment on the plaintiffs' nonwillful claims (Count I). Responding to the motion, the plaintiffs asserted that NBC's actions constitute a "continuing violation"—i.e., illegal discrimination occurs each time NBC hires a person other than the plaintiffs in an E/J position. The district court, holding that the "continuing violation doctrine is meaningless under the facts of this case," 569 F. Supp. 282, 286, granted NBC's motion.

We fully agree with the district court's observation that the plaintiffs' reaction to the motion for partial summary judgment was, in fact, unresponsive. A predicate for a civil suit under the ADEA is a charge (previously an intent-to-sue notice) filed with the appropriate administrative agency. 29 U.S.C. § 626(d). Liberally construing the plaintiffs' charges in this case, *see Dickerson v. DeLuxe Check Printers, Inc.*, 703 F.2d 276, 283 (8th Cir. 1983), we find allegations regarding the terminations and events prior to the dismissals, but no mention is made of subsequent acts by NBC. In short, no post-termination decision or act of NBC was made the basis of an administrative charge. The most recent decision properly before the court, therefore, is NBC's decision to terminate Herman, which was made known to him in April of 1978. *See Lawson v. Burlington Industries, Inc.*, 683 F.2d 862, 864 (4th Cir.), *cert. denied*, 103 S. Ct. 257 (1982) ("Each alleged discriminatory recall constitutes a separate and complete act by the defendant, which triggers a new 180 day period" for filing an administrative charge.); *Scaramuzzo v. Glenmore Distilleries*, 501 F. Supp. 727, 729 (N.D. Ill. 1980). This case was commenced more than two years after Herman and Mullaney received their dismissal notices and, absent any suggestion that the limitations period should be equitably modified, the district court correctly granted summary judgment in favor of NBC on the plaintiffs' nonwillful claims.

III.

Having eliminated nonwillful allegations from the case, NBC made a motion for summary judgment on the remaining claims of willful discrimination.[1] To prove willfulness, a "plaintiff must show that the defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA." *Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149, 156 (7th Cir. 1981). NBC, which posted ADEA notices and employed an ADEA compliance officer, was in no position to plead ignorance of the law. *See also id.* at 156 n.10. Accordingly, NBC attacked the plaintiffs' central allegation—that age played a role in the plaintiffs' separation from NBC.[2] To this end, NBC obtained from Willis Marshall, Director of Technical Operations and Engineering for WMAQ-TV, an affidavit stating that when he selected three E/J editors pursuant to a job posting in March 1978, he chose "the three best applicants" and "did not consider the ages of any of the applicants."

We believe that NBC's showing was insufficient to warrant summary judgment. It is the movant's burden to establish the absence of a genuine issue of material fact; if this burden is not met, the opposing party need not respond with evidentiary material. *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 160 (1970); *Egger v. Phillips*, 710 F.2d 292, 296 (7th Cir.) (en banc), *cert. denied*, 104 S. Ct. 284 (1983). NBC only submitted evidence indicating that age played no role in the selection of E/J editors in March 1978. However, the complaint, as amplified by answers to interrogatories, encompassed more than the 1978 selections. The plaintiffs were passed over when E/J positions were filled in 1976 and 1977, but NBC submitted no evidence to refute the allegation that age played a role in these hiring decisions.

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[1] The statute of limitations for willful claims is three years. 29 U.S.C. § 255(a) (incorporated by 29 U.S.C. § 626(e)(1)).

[2] In essence, therefore, NBC's position was that the plaintiffs could not prove a nonwillful violation.

Instead of attacking all of the plaintiffs' allegations on the merits, NBC mischaracterized the district court's order granting the initial motion for partial summary judgment, *see supra* at 3. The district court in that order removed the plaintiffs' nonwillful claims from the case; the court did not, contrary to NBC's assertion, limit the plaintiffs' allegations of willful violations to the employment choices made in March 1978. 569 F. Supp. at 288. NBC may believe that the March 1978 decisions are the only ones before the court because administrative charges were not filed within 180 days of the prior decisions, *see* 29 U.S.C. § 626(d)(1). But this unilateral understanding of the law as it applies to this case is not the only or inevitable view. The continuing violation doctrine, which has no place with respect to acts never made the basis of a charge, *see supra* at 3, does work "to toll the 180 day period for *filing with the EEOC.*" *Herman v. National Broadcasting Company*, 569 F. Supp. at 286 (emphasis in original); *see also Roberts v. North American Rockwell Corp.*, 650 F.2d 823, 826 (6th Cir. 1981); *Milton v. Weinberger*, 645 F.2d 1070, 1075 (D.C. Cir. 1981). Similarly, the 180-day period is subject to equitable modifications, *see Posey v. Skyline Corp.*, 702 F.2d 102, 104 (7th Cir.), *cert. denied*, 104 S. Ct. 392 (1983), and may not even commence running until "the employee knows or should know that an unlawful practice has been committed." *Aronsen v. Crown Zellerbach*, 662 F.2d 584, 593 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 1183 (1983). We raise these points of law, not to discuss their viability or application to the facts of this case, but to demonstrate that NBC's hiring decisions before March 1978 have not been eliminated from the case.

Although the award of summary judgment cannot be affirmed, it could still be the case that the March 1978 decisions should be removed from the list of possible ADEA violations. *See generally* Fed. R. Civ. P. 56(d) (case not fully adjudicated on summary judgment motion). Addressing this point in its brief to this court (as well as in its memorandum to the district court), NBC includes

the following "quote" purportedly from *Holder v. Old Ben Coal Company*, 618 F.2d 1198, 1202 (7th Cir. 1980):

> A desire to hire the more experienced or better qualified applicant is a non-discriminatory, legitimate and common reason on which to base a hiring decision. Thus . . . plaintiff must foreclose this possible explanation for a hiring decision before [a] prima facie case is established.

Appellee Brief at 15. Relying on this language, particularly the latter sentence, NBC asserts that "plaintiffs cannot meet the threshold requirements of a prima facie case of age discrimination." *Id.* at 17. NBC has, however, misquoted *Holder*. The sentence "Thus . . . plaintiff must foreclose this possible explanation for a hiring decision before a prima facie case is established" was deleted from the *Holder* opinion on April 17, 1980, when the petition for rehearing was denied. Thus four years after the opinion was modified and correctly published in the *Federal Reporter*, NBC continues to cite and rely on a deleted sentence. We, of course, do not suggest that NBC's attorneys have intentionally misrepresented *Holder*, but lawyerlike steps to ensure accuracy plainly were not taken.

A review of the submitted evidentiary materials reveals, in fact, that the plaintiffs can establish a prima facie case at trial. The plaintiffs were within the protected age group (Herman was 58 and Mullaney was 53) when their applications for E/J positions were rejected in March 1978. *See Monroe v. Equal Employment Opportunity Commission*, Nos. 83-1245 et al., slip op. at 13 (7th Cir. May 30, 1984); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176, 1180 (6th Cir. 1983). NBC, moreover, concedes that the plaintiffs "had minimal qualifications for the E/J editing positions"; and William Carter, NBC's supervisor of film department employees, testified in his deposition that he hoped to find E/J positions for "as many [film] people as possible." In short, Herman and Mullaney were the type of applicants that NBC sought, and they possessed

"qualifications similar" to those actually selected. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979); *Holder v. Old Ben Coal Company*, 618 F.2d 1198, 1202 (7th Cir. 1980) ("plaintiff must show that the employer was seeking applicants of qualifications comparable to plaintiff's").

The concept of a prima facie case, however, should not distract us from the real issue—whether age was a determining factor in NBC's March 1978 decisions. *See Monroe v. Equal Employment Opportunity Commission*, *supra*, at 12; *see also Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (plaintiff, at all times, retains the burden of persuasion). A prima facie case is not a complete shield against summary judgment. *See Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983). NBC produced a legitimate, nondiscriminatory reason for the rejections by submitting affidavits stating that qualifications, not age, determined the 1978 selections. *See Burdine*, *supra*, at 254. Consequently, the issue became (and still is) whether the evidence before the district court could support a jury verdict finding age discrimination. *See Mason v. Continental Illinois National Bank*, 704 F.2d 361, 366 (7th Cir. 1983); *accord Douglas v. Anderson*, 656 F.2d 528, 535 n.7 (9th Cir. 1981). We now turn to that evidence.

Willis Marshall, the NBC executive who made the hiring decision, stated in his affidavit that he selected the "three best applicants for the three E/J editing positions." Similarly, William Carter, the supervisor who advised Marshall on the matter, stated that he believed those chosen "were the three best applicants." Yet in his deposition, Marshall acknowledged that this type of hiring decision involves "subjective evaluation[s]." We understand this phrase to mean that reasonable employers could disagree about who were the best applicants; and, in any event, matters of preference that are not quantifiable were involved in the selection process. It is not wrong, and certainly not per se illegal, for an employer to exercise his business judgment as he sees fit. Yet a descrip-

tion such as "best" is not compelling evidence that the applicants' relative qualifications were such that no employer would have considered age. *See generally Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 n.9 (1st Cir. 1979).

NBC's defense is not particularly strengthened by examining the describable and objective qualifications of the plaintiffs and those hired—Messrs. Stecker, Martin, and Samuelson. The evidence indicates that Herman and Mullaney were the more experienced film editors (19 years and 15 years, respectively).[3] Herman also had videotape experience, something that none of those hired claimed on their applications. Marshall stated in his affidavit that he valued Stecker's experience as a cameraman, but Herman also had such a background. Marshall further declared that Samuelson "was the fastest editor at WMAQ-TV," but speed does not necessarily translate into quality, and there was no showing that a fast film editor can become a fast videotape editor. Finally, NBC submitted no evidence to denigrate the plaintiffs' talents.

We do not suggest that Herman and Mullaney were the most qualified applicants. We describe the showings on this question only to point out that NBC's position was not overwhelming. Nevertheless, if the plaintiffs had no proof beyond a bare-bones prima facie case, we might hold that the March 1978 allegations should be removed from the case. But the plaintiffs' evidence did not stop at the prima facie line.

In 1976, as the change from film to videotape was in its early stages, William Carter met with Frank Jordan, described by Carter as the person "responsible for personnel during the changeover." Jordan, who was based

[3] In its memorandum below, NBC stated that Martin "had 16 years of editing experience with WMAQ-TV." But the documents produced by NBC indicate that, although Martin had been with NBC for 16 years, he had 12 years of editing experience. This inconsistency is not significant, however, because one of those hired, Stecker, had only 7 years of editing experience.

in Washington, D.C., met with Carter in Chicago, where the two discussed moving people into E/J positions. Jordan asked Carter to prepare a memorandum listing the names of people in film positions, their company seniority, their proposed utilization, and *their dates of birth.* Carter collected the information, prepared the memorandum for Jordan, and gave a copy to Willis Marshall. Carter later added his personal rankings to the memorandum, which was then used by Marshall in making his March 1978 decisions. If age was not a factor in the hiring decisions, why did the memorandum requested by a top NBC executive, and used by those immediately responsible for hiring, contain such information? There may, of course, be a nondiscriminatory explanation, but that possibility does not detract from the evidentiary value of the document.

Moreover, the plaintiffs submitted an affidavit of Richard Ortner, which states that in a job interview with WMAQ-TV's General Manager in 1974, he was told, "Being 50 years old is an absolute no, no for being hired on staff." The General Manager, to be sure, left the Chicago station in 1976, but the transfer to videotape was already in progress. And, although NBC discounts the Ortner affidavit, past discriminatory acts of an employer are evidence of a "custom" or "policy" of discrimination. *See Morris v. Washington Metropolitan Area Transit Authority,* 702 F.2d 1037, 1045 (D.C. Cir. 1983).

Finally, the plaintiffs have statistical support for their case. The usefulness of statistical evidence depends on the circumstances of the case, *compare Reeves v. General Foods Corp.,* 682 F.2d 515, 525 (5th Cir. 1982), *with Kephart v. Institute of Gas Technology,* 630 F.2d 1217, 1224 (7th Cir. 1980), *cert. denied,* 450 U.S. 959 (1981), and we will not assess the force of the instant data.[4] We will

[4] The plaintiffs assert that an expert will testify that the statistics establish that age did play a role in NBC's hiring decisions. However, no affidavit to that effect was filed, *see* Fed. R. Civ. P. 56(e), and thus the district court properly ignored the assertion.

note that the 20 persons hired pursuant to the 1976, 1977, and 1978 job postings were all under 50 years old. To rebut the plaintiffs' view of the statistics, at oral argument NBC directed our attention to a document indicating that 16 film employees under 50 years old were not retained in the transition. That same document, however, shows that 33 persons *under* 50 were hired in new jobs, whereas all 11 employees *over* 50 were dismissed.

In conclusion, we disagree with the district court's statement that "plaintiffs . . . have offered no proof which casts doubt on the veracity of NBC's [proffered] reasons for making its hiring decisions." The district court may have believed that the plaintiffs needed direct evidence of discriminatory intent (such as an admission), but that plainly is not the law, *see United States Postal Service Board of Governors v. Aikens*, 103 S. Ct. 1478, 1481 n.3 (1983). As the Supreme Court declared in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 472 (1962), "we cannot say on this record that 'it is quite clear what the truth is.' " Accordingly, we hold that the March 1978 allegations should not be removed from the case.

IV.

For the reasons expressed in this opinion, the district court's order removing the allegations of nonwillful violations of the ADEA, contained in Count I, is affirmed. We reverse, however, the award of summary judgment and the case is remanded for proceedings consistent with this opinion. Circuit Rule 18 shall not apply and costs on appeal are awarded to the plaintiffs.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

FRANK HERMAN, FRANK MULLANEY AND GEORGE LUSSON, PLAINTIFFS,

v.

NATIONAL BROADCASTING COMPANY, INC., DEFENDANT.

No. 80 C 2207.

United States District Court, N.D. Illinois, E.D.

May 31, 1983.

MEMORANDUM OPINION AND ORDER

WILLIAM T. HART, District Judge.

Plaintiffs[1] Frank Herman ("Herman"), age 60, and Frank Mullaney ("Mullaney"), age 57, bring this two count complaint against their former employer National Broadcasting Company, Inc. ("NBC") alleging that NBC's failure to consider them for new staff positions, failure to train them for temporary positions and other acts constitute both willful and nonwillful discrete and continuing violations of The Age Discrimination in Employment Act of 1967, as amended 29 U.S.C. §§ 621 *et seq.* ("ADEA"). Jurisdiction is asserted pursuant to 29 U.S.C. § 626(b), 28 U.S.C. § 1331[2] and § 1343(4).

Presently before the Court is NBC's motion for partial summary judgment in its favor on all claims of nonwillful

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[1] By stipulation an additional plaintiff George Lusson was dismissed on January 26, 1981.

[2] The Court assumes that the plaintiffs intended to allege jurisdiction under § 1331, so-called federal question jurisdiction, although the complaint purports to assert jurisdiction under 28 U.S.C. § 1337, which relates to commercial and antitrust regulations.

violations. For the reasons stated below, NBC's motion for partial summary judgment is granted.

FACTS

Herman was employed as a full-time film editor in the news department of NBC's WMAQ—TV from 1966 until June 30, 1978. Mullaney was employed as a full-time assistant film editor, also in NBC's WMAQ—TV news department, from 1972 until May 19, 1978. In the Spring of 1978, NBC completed a technological conversion of its news gathering process, changing from film to videotape. Incident to that changeover, a new videotape department was created, known as the "Electronic Journalism Department." On March 14, 1978, NBC solicited applications for six engineering positions in the new department. Both Herman and Mullaney applied. Their applications were rejected in writing on March 31, 1979, ostensibly because all new positions had been filled. Herman and Mullaney also were informed that their respective applications would be kept on file pending vacancies.

At about the same time as they were rejected for new staff positions, Herman and Mullaney were notified that due to the change to videotape news gathering they would be discharged. Herman's letter of termination was received on April 28, 1978 and announced that his last day of regular employment by NBC would be June 30, 1978. Mullaney's letter of termination was dated March 24, 1978 and indicated that his final employment date would be May 21, 1978. Both letters noted that the impending dismissals were not for any cause attributable to the plaintiffs.

On May 8, 1978 Herman filed an age discrimination charge with the Wage and Hour Division of the Department of Labor and Mullaney filed a similar charge on May 11, 1978.[3]

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[3] Pursuant to a reorganization, the Equal Employment Opportunity Commission ("EEOC") assumed the handling of age discrimination charges. 1978 Reorg.Plan No. 1, Fed.Reg. 19807, 92 Stat. 3781.

Subsequent to their respective discharges, Herman and Mullaney were hired to perform temporary work at NBC. During the pendency of the EEOC investigation of their charges, Herman and Mullaney complained to EEOC investigators that NBC was continuing to discriminate against them due to their age by failing to train them for the temporary jobs and, despite an avowed hiring freeze, hiring younger persons than they for ultimate promotion to permanent positions. No formal complaints of post-termination violations were ever filed by the plaintiffs with the EEOC.

Herman and Mullaney filed this suit on May 2, 1980. They allege that NBC's failure to hire them for the newly created engineering jobs and certain post-termination conduct violated ADEA. Herman and Mullaney do not argue that NBC's decision to terminate them due to technological changes was improper.[4] But, they assert that it was only "at the time of their temination . . . that Plaintiffs were able to take an overview of what happened and saw that there was a distinct pattern of discrimination in hire against those 50 years of age and older."

NBC has moved for partial summary judgment on the plaintiffs' allegations of nonwillful age discrimination. Accord-

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[4] Nonetheless, all parties extensively discuss the law governing the filing period relative to discriminatory discharge. Under that law, the trigger point for filing is when the plaintiff is unequivocally notified of an impending termination and not the date on which the termination actually occurs. *Chardon* v. *Fernandez,* 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981); *Delaware State College* v. *Ricks,* 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980). As the claimed discriminatory act is not NBC's decision to terminate, *Chardon* and *Ricks* are irrelevant. However, even if discriminatory termination was claimed, this suit is still untimely. Herman and Mullaney were notified on April 28, 1978 and March 24, 1978 that they would be terminated on June 30, 1978 and May 19, 1978 respectively. If Herman and Mullaney had wanted to sue on those events, such suits were properly commenced within two years of the notice of discharge—on or before April 28, 1980 or March 24, 1980.

ing to NBC, a claim for nonwillful age discrimination must be filed within two years of the alleged violation. Since Herman and Mullaney were rejected for the new department on March 31, 1978, NBC argues that this suit is time barred as it was not filed on or before March 31, 1980. Plaintiffs do not dispute the two year limitations period for nonwillful violations of ADEA. Instead they counter the motion for partial summary judgment by characterizing NBC's conduct after their rejections as "continuing violations" of ADEA: each new incident with an independent filing period, unelapsed on May 2, 1980.

DISCUSSION

ADEA discrimination claims are governed by the following filing time requirement and statutes of limitation: (1) A claimant must file a discrimination charge with the Secretary of Labor within 180 days after the occurrence of the alleged unlawful act. 29 U.S.C. § 626(d)(1); (2) A lawsuit alleging a nonwillful violation of ADEA must be commenced within two years after the occurrence of the alleged violations. 29 U.S.C. § 626(e)(1), incorporating section 6 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 255; and (3) A lawsuit alleging a willful violation of ADEA must be commenced within three years after the occurrence of the alleged willful violation. 29 U.S.C. § 626(e)(1), incorporating section 6 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 255.

NBC concedes that the plaintiffs' allegations of willful discrimination are within the three year limitation period. Whether Herman and Mullaney's claims of nonwillful violations of ADEA are timely, however, is disputed. Resolution turns on isolating the actionable behaviors and pinpointing their occurrence dates. Here the complaint and pleadings allege two discrete violations or classes of violations: the rejections and the continuing violations. Dating the alleged rejection violations is not a problem. Assuming the rejections were discriminatory, the violations occurred on March 31, 1978,

the date the plaintiffs were notified of the unavailability of positions in the Electronic Journalism Department. Their respective ADEA charges were filed with the EEOC on May 8, 1978 and May 11, 1978—well within the 180 day filing period.[5]

The two year statutes of limitation for bringing an ADEA suit in federal court for nonwillful violations commences on the same date as the 180 day period for filing a charge with the EEOC, *i.e.*, the violation date. *See, e.g., Marshall v. Kimberly Clark, Inc.*, 625 F.2d 1300 (5th Cir.1980). Thus, a complaint charging discriminatory rejection was due in this Court no later than March 31, 1980. This suit, however, was filed on May 2, 1980.

Regardless, Herman and Mullaney claim that the statute of limitations for filing was tolled because NBC's alleged "continuing violation" occurred sometime after their late May and June 1978 terminations. Under their view, a suit for nonwillful ADEA violations filed on May 2, 1980 is timely. The plaintiffs argue that they told the EEOC about the continuing violations incident to the EEOC's investigation of NBC. The Court does not doubt that the plaintiffs told the EEOC their versions of NBC's post-termination actions and motives. Furthermore, the Court notes that the EEOC investigation of NBC continued at least through 1979. However, those facts are irrelevant to the issue here. Herman and Mullaney misunderstand the legal nature of a "continuing violation" and the effect such a finding has on the timing of ADEA litigation.

A "continuing violation" derives from an ongoing discriminatory policy which adversely affects persons within the

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[5] Although the exhibits do not indicate the specifics of the charges filed, the Court assumes that the rejections were the focus of the charges. Other allegedly unlawful behavior by NBC had not yet occurred. Nor had the plaintiffs yet formed a suspicion of what they term a pattern of age discrimination by NBC against its employees 50 years and older.

protection of ADEA or Title VII.[6] *See, e.g., Roberts v. North American Rockwell Corp.*, 650 F.2d 823 (6th Cir. 1980); 2 Larson, "Employment Discrimination" 9A § 48.54 (1980). Unlike a discrete violation, such as a discriminatory discharge, it is difficult to date a violation bottomed on a failure to hire or promote due to the employer's ongoing unlawful policy. For example, where there is proof that a plaintiff has made numerous inquiries of the status of a previously rejected application for hire or promotion, and he is again rejected or put off, the most recent rejection in the continuing series is the violation date. *Roberts v. North American Rockwell Corp., supra; Beit v. Johnson Motor Lines, Inc.*, 458 F.2d 443 (5th Cir.1972).

The effect of finding a "continuing violation" is to toll the 180 day period for *filing with the EEOC.* The last violation, rather than the first in a series, is the triggering event. So long as a plaintiff claims, when he or she eventually files with the EEOC, that there was within the preceding 180 days a present violation and not just the lingering effects of a past violation, the filing is timely. *United Air Lines, Inc. v. Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); *Farris v. Board of Education,* 576 F.2d 765 (8th Cir.1979). Here the plaintiffs timely filed their charges of unlawful rejection with the EEOC. It is only later that they alleged other or an ongoing series of discriminatory acts. Since the 180 day filing period was met, however, no EEOC filing period for the unlawful rejections need be tolled. The continuing violation doctrine is meaningless under the facts of this case. *See Scaramuzzo v.*

[6] Numerous cases hold that ADEA, like Title VII, is a remedial statute with comparable aims and the law developed in Title VII cases generally is applied to ADEA litigation. *See, e.g., Coke v. General Adjustment Bureau, Inc.*, 616 F.2d 785 (5th Cir. 1980); *Kephart v. Institute of Gas Technology,* 581 F.2d 1287 (7th Cir. 1978), *cert. denied,* 450 U.S. 959, 101 S.Ct. 1418, 67 L.Ed.2d 383 (1981).

Glenmore Distilleries Co., 501 F.Supp. 727, 729 n. 2 (N.D.Ill.1980).

When Herman and Mullaney filed with the EEOC in April 1978, they unequivocally announced that at least one violation, their rejections for new positions, preceded that filing within 180 days. Those charges of improper rejection were lost unless suit was instituted by March 31, 1980. Plaintiffs' argument that it was only after their respective terminations that they were able to discern a pattern of age discrimination is to no avail. They obviously were suspicious enough of NBC's motives against them before their terminations to file an age discrimination charge with the EEOC. Having properly filed with the EEOC in the first instance, they cannot now ignore the reason for that filing and its applicable limitations' period.

Had Herman and Mullaney timely sued on their charges of discriminatory rejection, they could have raised NBC's post-termination conduct as evidence of a discriminatory pattern of behavior which NBC allegedly practiced against its older employees or at least against Herman and Mullaney. This Circuit holds, albeit in a Title VII context, that a claim may encompass any acts of discrimination similar or reasonably related to the allegations made in the initial EEOC charge. *Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.*, 538 F.2d 164, 167 (7th Cir.) (*en banc*), *cert. denied*, 429 U.S. 986, 97 S.Ct. 506, 50 L.Ed.2d 598 (1976). An administrative charge only triggers the EEOC investigation and its efforts at conciliation. *Id.* at 168. Any civil action subsequently filed "grows out of the administrative investigation rather than the employee's specific allegations." *McCray v. Standard Oil Co. (Indiana)*, 76 F.R.D. 490, 497 (N.D.Ill.1977). *See also Scaramuzzo v. Glenmore Distilleries Co., supra*, at 730.

No cases were located, however, which hold that the time for bringing suit on new or old claims is open-ended so long as the initial 180 filing period for the old claim is respected and the new claims are raised in the course of the EEOC investigation.

It is possible that an EEOC investigation of NBC could have continued until 1980 or beyond. Also possible is that during the investigation Herman and Mullaney would have remained in NBC's temporary and allegedly discriminatory employ. Under the plaintiffs' theory, if they told the EEOC about any of NBC's so-called continuing violations, they could have stalled suing for the allegedly discriminatory rejections and for the new claims until 1982 or beyond—even though the only EEOC charge was filed in 1978.

ADEA is to the contrary. A suit for nonwillful violations must be brought within two years of the unlawful act. The continuing violation doctrine does not alter that law. After the 180 filing period is met for the later rather than the earlier violation, the two year limitation period inalterably follows. Unless Herman and Mullaney separately filed EEOC charges within 180 days of any violations occurring after March 31, 1978, those claims as well as the discriminatory rejection claims are forfeited.

The Seventh Circuit's recent admonition that in an employment discrimination context all doubts on a jurisdictional point must be resolved in favor of plenary trial rather than dismissal at the pretrial stage is not controlling here. *See Pastrana v. Federal Mogul Corp.*, 683 F.2d 236, 242 (7th Cir.1982) (dismissal inappropriate where issue is whether plaintiff alleged national origin *and* physical handicap discrimination before the EEOC where EEOC intake officer checked only one box despite plaintiff's oral charge of both types of discrimination). Here, there is no question as to when the rejections occurred. The plaintiffs timely filed and described their allegations of rejection in April of 1978. They were not prevented from bringing other claims to the attention of the EEOC at that time: the alleged continuing violations were still in the future. Similarly the plaintiffs did not formally charge NBC with continuing violations in such a way as to fix a timeframe for commencing suit two years after those subsequent violations allegedly occurred.

Having failed to sue within two years of the rejections or bring separate charges of post-termination violations, this action is untimely as a matter of law. No genuine issues of material fact on those points remain for trial and partial summary judgment in NBC's favor is appropriate. Fed.R. Civ.P. 56.

The plaintiffs' fall back position is that NBC waived its right to raise the statute of limitations by allegedly failing to raise or preserve the defense by answer or otherwise. The plaintiffs are incorrect. First, NBC's answer denies that plaintiffs complied with all procedural prerequisites to bringing an ADEA action. Second, NBC's second affirmative defense is that the plaintiffs' complaint is deficient because it does not assert that the plaintiffs complied with various filing prerequisites under ADEA. Based on NBC's answer and affirmative defense, the Court finds that the plaintiffs were properly apprised of NBC's concerns for the jurisdictional basis of this suit. NBC was not required to specifically amend its affirmative defense once it discovered the dates critical to this suit. NBC properly filed this motion for partial summary judgment.

IT IS THEREFORE ORDERED that

1. Summary judgment is granted in favor of NBC and against Herman and Mullaney on Count I.

2. Summary judgment is granted in favor of NBC and against Herman and Mullaney on the allegations of nonwillful violations of ADEA made in Count II.

3. The allegations of willful violations of ADEA in Count II remain for trial.

4. A status hearing will be held on June 10, 1983 at 9:30 a.m. to set a date for submission of an amended pretrial order.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

FRANK HERMAN and FRANK MULLANEY, *Plaintiffs,*	}	
v.	}	No. 80 C 2207
NATIONAL BROADCASTING COMPANY, INC. *Defendant.*	}	

MEMORANDUM OPINION AND ORDER

Presently before the Court is the motion of defendant National Broadcasting Company, Inc. ("NBC") for summary judgment on plaintiffs' claim of wilful violations of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621, *et seq.* ("ADEA"). On May 31, 1983, the Court granted NBC's motion to dismiss as untimely the plaintiffs' claims of nonwilful violations of ADEA. The facts of the case are set out in the Memorandum Opinion and Order issued at that time. The following additional facts are necessary to resolve the instant motion.

1. WMAQ-TV posted a written announcement on March 14, 1978 stating the qualifications desired for six staff positions which NBC sought to fill in its newly formed Electronic Journalism ("E/J") Department:

> Experience in camera and editing techniques. News gathering experience at a major market T.V. station preferred.

Three persons were to be selected as E/J editors and three as minicam operators.

2. Willis O. Marshall ("Marshall"), WMAQ-TV's Director of Technical Operations and Engineering, allegedly was solely responsible for hiring the six E/J employees sought in the March 1978 notice.

3. Marshall asserts that the qualifications specified—experience in camera *and* editing—did not mean that only candidates with both types of experience would be considered. Rather, he says that the notice should be construed as he intended it, *i.e.,* experience in one or the other, or both.

4. Marshall asked William B. Carter ("Carter"), Supervisor of E/J Operations, to designate his top eight choices for E/J editing positions from among the applicants who were then editors or assistant editors or assistant editors in the News Department. Neither plaintiff, Frank Herman ("Herman") nor Frank Mullaney ("Mullaney"), was ranked one to eight. Carter also was asked to separately rank film crew applicants seeking minicam positions.

5. Although Marshall admits to having seen a list of the applicants which included their ages, Marshall claims that Carter's list of the top eight was composed without consideration of the applicants' ages. Marshall further states that his ultimate selections were not age biased.

6. Marshall also admits to having heard of ADEA but not to being aware of its explicit provisions, *i.e.,* ADEA protects persons between the ages of 40 and 70 from employment discrimination due to their age. It is undisputed that NBC had posted ADEA notices and had appointed an employee designated as an ADEA compliance officer.

7. None of the three persons selected as E/J editors in March 1978 was 40 years old or older; two of the three selected as minicam operators were in their forties.

8. In March 1978, Herman and Mullaney were ages 58 and 53 respectively.

9. Marshall claims that the three E/J editors selected had skills superior to those of Herman or Mullaney. Marshall notes the alleged exemplary qualifications of the three: 16 years of experience and the "best" editor at WMAQ-TV, having won several awards for outstanding achievement in editing; 11 years of editing experience and the "fastest" editor at WMAQ-TV; 7 years of editing as well as camera experience. Marshall further claims that other factors, such as recommendations of supervisors, figured in his final decisions.

10. Neither plaintiff disputes the credentials of the editors selected, nonetheless they claim that they were more qualified than the three selected. Herman had 12 years experience as a film editor as well as experience in camera and video tape editing. Mullaney had six years experience as an assistant editor. In support of his alleged superior qualifications, Mullaney notes that during the period after his rejection for a permanent E/J position, several of the pieces he edited while in NBC's temporary employ were nominated for an "Emmy" award. He also cites the fact that he did not have to be specially trained for his temporary position in the E/J department.

DISCUSSION

In order to find a defendant liable for wilful violation of ADEA, and a plaintiff entitled to liquidated damages, 29 U.S.C. § 626(b), "[t]he showing must clearly be greater than that necessary for the initial finding of ADEA liability." *Syvock v. Milwaukee Boiler Manufacturing Co., Inc.*, 665 F.2d 149, 156 n.10 (7th Cir. 1981). Thus, whether the Court need consider if NBC has wilfully violated ADEA depends first on a finding that ADEA has been violated in a nonwilful way.

The prima facie case of nonwilful age discrimination must of necessity be a flexible one. Here, Herman and Mullaney must show that they had all of the qualifications needed for the positions sought.[1] *See, e.g., Kephart v. Institute of Gas Technology,* 630 F.2d 1211, 1219-20 (7th Cir. 1980), *cert. denied,* 450 U.S. 959 (1981); *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1019 (1st Cir. 1979). Plaintiffs also must prove that they were *at least as qualified* as the applicants who were selected for the E/J editing positions. The Seventh Circuit stated, albeit in a Title VII context,

> A desire to hire the more experienced or better qualified applicant is a nondiscriminatory, legitimate and common reason on which to base a hiring decision. Thus ... plaintiff must foreclosee this possible explanation for a hiring decision before [a] prima facie case is established (citations omitted).

Holder v. Old Ben Coal Co., 618 F.2d 1198, 1201-02 (7th Cir. 1980).

Herman and Mullaney have made only conclusory allegations that they were *more* qualified than the three persons selected by Marshall to become E/J editors. Neither Herman nor Mullaney conducted any discovery of NBC personnel which might have supported their allegations or at least contradicted NBC's assertions. It is true that both plaintiffs were minimally qualified to fill the E/J positions; however, "minimally qualified" is not the same as "better qualified" or even "as qualified."

Herman's assertion of his alleged better qualifications stems primarily from his interpretation of the posted notice. His view is that NBC solicited for E/J editors with *both* editing *and* camera experience and that among the three editors selected only one had both types of experience. Herman's view

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[1] It is undisputed that plaintiffs are within the age categories protected by ADEA and that they were not hired: two other elements of the prima facie age case.

is not supported by any testimony other than his and Mullaney's. Marshall testified that the qualifications stated were alternatives and not cumulative. Some support for Marshall's position is found in an earlier notice of February 7, 1977. That notice for E/J positions reads "Qualifications Desired ... experience in camera and/or editing techniques." Clearly, the 1978 notice unlike the 1977 notice is not expressed in the disjunctive. However, on a motion for summary judgment it is the burden of the party opposing the motion to come forward with proof contradicting the movant's support. The opponent may not rest on the allegations of his pleading. Fed. R. Civ. P. 56(d). The plaintiffs "must show *specific* facts indicating that a genuine issue does indeed exist." *Posey v. Skyline Corp.*, 702 F.2d 102, 106 (7th Cir. 1982) (emphasis in original).

No specific facts contradicting Marshall's asserted intention to seek candidates with either qualification are offered. Furthermore, Marshall has given uncontradicted testimony that the three editors selected had special skills which contributed to those candidates' superior qualities, *i.e.*, the "best editor" or the "fastest" editor.

The third editor had seven years experience in editing and camera. Herman claims to have 12 years of editing experience as well as experience in camera. It is unclear whether Herman's camera experience was co-extensive with his editing, *i.e.*, 12 years of each. Assuming for purposes of this motion that it was and, therefore, that Herman had five years more joint experience than the third E/J editor selected, Herman still has failed to introduce facts which controvert Marshall's testimony that factors other than length of combined service influenced the hiring process.

Mullaney's assertion of better qualifications allegedly are supported by the facts that the work he performed during his temporary assignment was nominated for special industry recognition and that he needed no training for the temporary work. Assuming *arguendo* that Mullaney was better qualified

than the younger candidates selected, Mullaney's offer of his later honors or skills as the only support of his claims is insufficient. NBC cannot be expected to judge an applicant on his future achievements.

In *Locke v. Commercial Union Insurance Co.*, 676 F.2d 205, 206 (6th Cir. 1982), the Sixth Circuit held

> The plaintiff did nothing more than state his conclusion that he was terminated because of his age. To permit this single statement to constitute a prima facie case would place on employers a burden which Congress never intended. There is no automatic presumption that every termination of an employee between the ages of 40 and 70 results in a violation of the Age Discrimination in Employment Act. Yet to permit a plaintiff to shift the burden to the defendants of justifying a termination on such conclusory statement would have this effect.

Similarly plaintiffs' single, conclusory statement of superior qualifications fails to establish a prima facie case.

Had plaintiffs established a prima facie case, they would be entitled only to an inference of age discrimination. The ultimate burden of proof remains with the plaintiffs throughout. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The inference is disspelled if the employer states a nondiscriminatory business reason for the decision and that reason is not shown to be a pretext for discrimination. *See, e.g., Loeb v. Textron, supra* at 1014-15, *citing Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

NBC has stated a legitimate, nondiscriminatory reason for rejecting Herman and Mullaney and for selecting three others in their stead: the others were more qualified. "No rational enterprise that has several qualified candidates for a position selects among them by lot; it picks the best qualified." *Mason v. Continental Illinois National Bank*, 704 F.2d 361 (7th Cir. 1983) (Title VII).

In light of the uncontradicted testimony of Marshall as to the notice's intent to seek candidates with either camera or editing skills, his uncontradicted assertion that the editors selected were superior to Herman and Mullaney and the lack of any substantiated and material evidence of age discrimination,[2] this Court will not second guess the basis for NBC's business judgment. ADEA "was not intended for judicial review of business decisions." *Kephart v. Institute of Gas Technology, supra* at 1223.

Had the plaintiffs made out a prima facie case, NBC would have carried its burden of producing a legitimate non-discriminatory reason for failing to hire Herman and Mullaney for E/J editing positions. The presumption raised by the prima facie case would have been rebutted.

In that case, plaintiffs could have proved nonwilful age discrimination only by showing that the stated business reason for failing to hire them was pretextual, a cover-up for age discrimination. *Golomb v. Prudential Insurance co.*, 688 F.2d 547, 551 (7th Cir. 1982). To prove pretext, the plaintiffs would have to show that their age was a determining factor in the decision by NBC to reject them and that but for their ages they would have been hired. *Id. See also Loeb v. Textron, Inc., supra.*

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[2] The finding of no age discrimination is not based upon NBC's assertions that NBC's workforce includes a large majority of persons older than forty, Marshall and Carter were over fifty when the disputed decisions were made or minicam operators were hired who were in their forties. First, the instant claim charges a refusal to *hire*; it does not allege that NBC fires workers within the protected age range. NBC could violate ADEA if it failed to hire older workers but did not fire those in place. Second, ADEA protects persons anywhere along the continuum of ages 40 to 70. The plaintiffs claim that NBC discriminates against persons fifty or over. NBC could have a workforce composed entirely of persons between the ages of 40 and 49 and still violate ADEA if it would not hire persons 50 or older due to their age.

The plaintiffs, however, have offered no proof which casts doubt on the veracity of NBC's reasons for making its hiring decisions. It is irrelevant that Marshall may have known or should have known the range of ADEA's protection or that Herman and Mullaney fell within the range. Judge Getzendanner recently granted summary judgment to an ADEA defendant where the employer's imputed knowledge of plaintiff's birthdate allegedly presented a genuine issue of fact:

> To embrace [plaintiff's] logic, I would thus have to agree that an employer is never entitled to summary judgment whenever a plaintiff establishes that the employer knew or should have known it was replacing an age-protected employee with a younger worker. Clearly this cannot be the law, at least when there is also evidence upon which to conclude that the employer acted for nondiscriminatory reasons. ... Plaintiff's proposed theory ... would seemingly mandate a "full dress trial" in virtually all cases.

Roane v. GTE Automatic Electric, Inc., 80 C 3551 (N.D. Ill. 1982), at 7-8.

So too in the instant case. Herman and Mullaney cannot defeat NBC's motion simply by claiming that Marshall knew or should have known from a list within his control that Herman and Mullaney were older than the three E/J editors selected.

Certainly plaintiffs' assertion that "age must have been the determining factor because they can think of no other reason for their rejections" does not create a material issue of fact in the face of NBC's nondiscriminatory reason for its hiring decisions. *See, e.g., Locke v. Commercial Union Insurance Co., supra; Ortiz v. Ciba-Geigy Corp.*, 87 F.R.D. 723 (N.D. Ill. 1980) (Title VIII). Plaintiffs offer an affidavit of a person who was rejected for a position at NBC in 1974. Even if the facts asserted in the affidavit are true, *i.e.*, that the applicant was rejected by an NBC executive on the ground that no one over 50 is hired for an NBC staff position, the affidavit is worthless here. Herman and Mullaney applied for positions in 1978, not

in 1974; the positions that they sought were different than that sought by the affiant; and the NBC employee who allegedly made the discriminatory remarks was removed from his position in 1976. The facts asserted in the affidavit, the only affidavit other than statements of the plaintiffs, do not present a triable controversy.

Having failed to establish nonwilful age discrimination, it is unnecessary to consider the asserted claim of wilful age discrimination. For the stated reasons, IT IS THEREFORE ORDERED that summary judgment on the remaining claim of wilful violation of ADEA is granted in favor of NBC.

ENTER:

WILLIAM T. HART
United States District Judge

Dated: Sept. 19, 1983